

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE:)	
)	
ZANY BRAINY, INC., <u>et al.</u> ,)	CASE NO. 01-1749 (SLR)
)	CHAPTER 11
Debtors.)	
)	
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THE PROVIDENT BANK,)	
)	
Plaintiff,)	
)	
v.)	Adv. Proc. No. A-01-9128 (SLR)
)	
ZANY BRAINY, INC., ZB)	
ACQUISITION CO. and WELLS)	
FARGO RETAIL FINANCE, LLC,)	
)	
Defendants.)	
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MEMORANDUM ORDER

At Wilmington this 18th day of June 2002, having reviewed the papers submitted in connection with the motions to dismiss filed by defendants Zany Brainy, Inc. ("Zany Brainy") and ZB Acquisition Co. ("ZB"), and having heard oral argument on same;

IT IS ORDERED that the motions to dismiss (D.I. 4, 8) are granted in part and denied in part for the reasons that follow:

1. **Nature and stage of the proceedings.** Plaintiff The Provident Bank ("Provident") filed the above captioned adversary

proceeding on December 12, 2001 against defendants seeking imposition of a constructive trust over approximately one-half million dollars that were mistakenly deposited by Provident into an account owned by defendant Zany Brainy and thereafter transferred to defendant ZB. The complaint includes counts for constructive trust, unjust enrichment, conversion, negligence, and punitive damages. Zany Brainy and ZB filed motions to dismiss based on various theories. The court heard oral argument on these motions on April 25, 2002.

2. **Legal standard.** In analyzing a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court must accept as true all material allegations of the complaint and it must construe the complaint in favor of the plaintiff. See Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d Cir. 1998). "A complaint should be dismissed only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations of the complaint." Id. Claims may be dismissed pursuant to Rule 12(b)(6) only if the plaintiff cannot demonstrate any set of facts that would entitle it to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The moving party has the burden of

persuasion. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991).

3. **Factual background.** Taking as true the allegations in the complaint:

a. At all relevant times Zany Brainy maintained a "cash concentration" account (the "account") at Provident for nationwide cash receipts from the operation of its retail outlets for high quality toys, games, books, and multimedia products for children.

b. On or about January 31, 2001, the following amounts were "mistakenly credited" to the account:

- 1) \$62,746.50;
- 2) \$ 7,002.00;
- 3) \$43,718.50; and
- 4) \$ 9,070.00.

(D.I. 1, ¶ 9)

c. On or about February 1, 2001, the following amounts were "mistakenly credited" to the account:

- 1) \$49,208.25; and
- 2) \$ 9,381.00.

(Id., ¶ 11)

d. On or about February 5, 2001, the following amounts were "mistakenly credited" to the account:

- 1) \$66,019.00;

- 2) \$10,992.00;
- 3) \$90,129.15;
- 4) \$13,124.00;
- 5) \$86,678.00; and
- 6) \$13,965.00.

(Id., ¶ 13)

e. Between March 7 and March 9, 2001, the sum of \$121,280.00 was also "erroneously credited" to the account.

(Id., ¶ 15)

f. On May 15, 2001, Zany Brainy and five (5) of its affiliates and subsidiaries filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

g. On or about May 18, 2001, the following amounts were "mistakenly credited" to the account:

- 1) \$ 1,115.95;
- 2) \$ 1,053.99; and
- 3) \$ 1,161.32.

(Id., ¶ 16)

h. On August 16, 2001, the court entered an order approving the sale of substantially all of Zany Brainy's assets to ZB pursuant to § 363 of the Bankruptcy Code. Thereafter, substantially all of Zany Brainy's assets, including the account, were sold and transferred to ZB. (Id., ¶ 23)

i. On or about August 29, 2001, Provident discovered that between March 7 and March 9, 2001, it had "erroneously deposited" funds in the amount of \$121,280.00 into the account. Demand was made of Zany Brainy on August 29, 2001; the funds were returned by Zany Brainy on or about September 5, 2001.

j. On or about October 1, 2001, Provident discovered that it had "erroneously deposited" funds in the amount of \$3,330.26 into the account. Demand was made of Zany Brainy on October 1, 2001; the funds have not been returned.
(Id., ¶ 19)

k. On or about November 7, 2001, Provident discovered that it had "erroneously deposited" funds in the amount of \$495,043.70 into the account. Demand was made of Zany Brainy on November 7, 2001; the funds have not been returned.
(Id., ¶ 21)

l. On or about November 25, 2001, Provident filed a proof of claim in the amount of \$498,373.98, apparently accounting for all of the prepetition transfers.

4. Discussion.

a. The court agrees that constructive trust and punitive damages are equitable and legal remedies, respectively, not legal duties owed from one party to another. Therefore,

those counts alleging constructive trust and punitive damages shall be dismissed.

b. While the court understands the sanctity of a § 363 order, by the same token the court will not countenance bad faith in a bankruptcy proceeding. Under the circumstances at bar, where all of the defendants appeared before this court and benefitted from the bankruptcy process, the court declines to dismiss the adversary so that a full and fair record will be developed as to the events at issue, including the scope of the due diligence performed by defendants and the knowledge, if any, of defendants relating to the funds erroneously deposited into the account.

NOW, THEREFORE, IT IS FURTHER ORDERED that the court shall conduct a telephonic scheduling conference on **Friday, July 26, 2002 at 11:00 am**. Counsel for Provident will initiate the telephone call.

Sue L. Robinson
United States District Judge